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In the Supreme Court of the United States

OCTOBER TERM, 1979

AUTHORIZED AIR CONDITIONING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 606 F.2d 899. The decision and order of the Board (Pet. App. 18-39) are reported at 236 N.L.R.B. No. 24.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1979. The petition for a writ of

certiorari was filed on January 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly concluded that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to execute and abide by a collective bargaining agreement negotiated by the multi-employer bargaining association of which it was a member and the union representing a majority of petitioner's employees at the time petitioner entered the multi-employer bargaining unit.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. 2-4).

STATEMENT

1. Petitioner is a heating, cooling and air conditioning contractor in the building and construction industry, and operates primarily in the Southern California area (Pet. App. 20, 22). In July of 1974, Paul Osborne, petitioner's president and general manager, contacted Paul Healy, the business manager of Local 509, Sheet Metal Workers' International Association ("Local 509"), and indicated that petitioner was interested in employing Local 509 members (Pet. App. 22). On September 9, 1974, Osborne signed, on petitioner's behalf, a collective

bargaining agreement consisting of two documents: a Standard Form of Union Agreement negotiated by the Sheet Metal Workers' International Association (the "International Union") and the Sheet Metal and Air Conditioning Contractors National Association ("SMACCNA"), and an Addendum to the Standard Form negotiated by Local 509 and the Inland Air Conditioning and Refrigeration Contractors' Association (the "Contractors' Association"). Both documents were to remain in effect until July 31, 1976 (*ibid.*).

Osborne also signed a Notice of New Shop Contract listing five persons as employees of petitioner as of September 9, 1974 (Pet. App. 23). At that time, none of petitioner's employees were members of Local 509 or had otherwise authorized Local 509 to represent them in collective bargaining (Pet. App. 22).[1] Article V, Section 1 of the Standard Form contained a "union security" provision binding the employer to require membership in the union within eight days of an employee's first day of work as a condition of continued employment (Pet. App. 22-23). Upon signing the Standard Form and the Notice of New Shop Contract, Osborne was told by Healy that petitioner's employees would have 30 days to sign applications for membership in Local 509 (Pet. App. 23). On October 9, 1974, four of the five

[1] Section 8(f) of the National Labor Relations Act, 29 U.S.C. 158(f), permits employers engaged primarily in the building and construction industry to enter into collective bargaining agreements with unions that have not yet established majority status.

employees listed on the Notice of New Shop Contract signed Local 509 membership applications. The fifth employee was an apprentice (*ibid.*).

On September 29, 1975, petitioner submitted applications for membership in the Contractors' Association and its parent organization, SMACCNA (Pet. App. 23). The one-page Contractors' Association application expressly provides, *inter alia*, that the applicant agrees to be bound by the Association's by-laws and to become a party to and be bound by existing labor agreements between the Association and Local 509, designates the Association as the applicant's collective bargaining representative, and authorizes the Association to execute labor agreements binding upon its members in accordance with the Association's by-laws (Pet. App. 23-24, 31). By letter dated December 18, 1975, petitioner was notified that it had been accepted into the membership of the Association and SMACCNA. The letter stated that the by-laws of both organizations were enclosed (Pet. App. 24).

On February 26, 1976, Local 509 gave the Contractors' Association timely notice of its intent to reopen their agreement. Negotiations commenced on May 20, 1976 (Pet. App. 6-7, 25). In June of 1976, the Association provided Local 509 with a list of its members, on which petitioner's name appeared (*ibid.*). On August 9, 1976, having failed to reach an agreement on wages, the Association and Local 509 referred the issue to the National Joint Adjustment Board, as provided in their 1973-1976 contract (Pet. App. 7, 27). On August 11, the Adjustment Board issued a unanimous decision setting forth the wage increase to be included in the new contract and providing that the contract would be effective August 1, 1976, through July 31, 1978 (Pet. App. 28). A few days later, the Association and Local 509 signed a new collective bargaining agreement, and Local 509 began to contact individual members of the Association in order to secure their signatures on the contract (*ibid.*).

In a letter dated July 14, 1976, petitioner notified the Contractors' Association of its intention to withdraw from membership effective June 1, 1976 (Pet. App. 25). The Association's board of directors took no action with respect to the letter because it was untimely under the Association's by-laws (Pet. App. 26).[2]

In late August 1976, Local 509's business manager contacted Osborne and asked him to sign on petitioner's behalf the new agreement between the Contractors' Association and Local 509 (Pet. App. 28). Osborne refused, and stated that petitioner had resigned from the Association (*ibid.*). About a week later, after learning that petitioner's letter of withdrawal from the Association was untimely, Local 509's business manager again requested Osborne to sign the agreement (*ibid.*). Osborne stated that his

[2] The Association's by-laws provide that a member may not withdraw within four months prior to or after the termination date of any collective bargaining agreement to which the Association is a party and which covers the member's employees. The by-laws also provide that a member's resignation will become effective only upon acceptance by the Association's board of directors (Pet. App. 26-27).

position had not changed and that he would not sign the agreement, explaining that "the wages are too high" in the new contract (Pet. App. 28-29). Thereafter, petitioner failed to make any of the required payments to its employees' health and pension funds as provided for in the new agreement (Pet. App. 29).

2. Local 509 then filed unfair labor practices charges. Petitioner defended by arguing, *inter alia*, that it was not obliged to bargain with the union since the Union did not represent a majority of petitioner's employees at the time the pre-hire agreement was entered into, at the time petitioner joined the Contractors' Association, or at the time petitioner refused to sign the 1976-1978 bargaining agreement negotiated by the Association. An administrative law judge rejected this contention stating (Pet. App. 32-33) (citations and footnote omitted):

> It is true that the Union represented none of Respondent's employees on September 9, 1974, when Respondent signed a collective-bargaining agreement with the Union. However, such a contract in the building and construction industry is valid under Section 8(f) of the Act. Although it is well established that a contract entered into pursuant to Section 8(f) does not of itself raise a presumption of majority status * * *, once a majority is in fact achieved, the normal presumption of majority that flows from a collective-bargaining agreement applies thereto. * * *. The record establishes that in November 1974 a majority of the employees employed by Respondent were members of the Union. Thereafter, a presumption of majority flowed from the union contract which has not been rebutted. * * *.
>
> This contract was still in force at the time Respondent joined the Association. Since the Union was then the majority representative of Respondent's employees, Respondent was free to merge them into a multi-employer unit.

The Board adopted the administrative law judge's rulings, findings and conclusions, and ordered petitioner to sign, implement, and give retroactive effect to the 1976-1978 contract, and to recognize and bargain with Local 509 as the representative of its employees (Pet. App. 18-19, 37-39). The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1-17).

ARGUMENT

Petitioner does not challenge the settled proposition that the existence of a valid collective bargaining agreement creates a presumption of majority status on the part of the bargaining representative. *Hexton Furniture Co.*, 111 N.L.R.B. 342 (1955). Rather, relying on *NLRB* v. *Iron Workers, Local 103*, 434 U.S. 335 (1978), petitioner contends that such a presumption is not created where, as here, a Section 8(f) pre-hire agreement is involved. There is no merit to this claim.

In *Iron Workers*, the Court held that Section 8(b)(7)(C) of the National Labor Relations Act, 29 U.S.C. 158(b)(7)(C), was violated by union picketing to enforce a Section 8(f) agreement against an

employer utilizing non-union labor, where the agreement did not contain a union security clause and the union had never represented a majority of the employees. Because the union admittedly lacked majority status, "the collective-bargaining relationship and the union's entitlement to act as the exclusive bargaining agent had never matured." 434 U.S. at 346. The Court recognized, however, that where a union "successfully seeks majority support" after entering into a pre-hire agreement, "the pre-hire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit." *Id.* at 349-350. The Court also noted, with apparent approval, the Board's view that "[o]ne-time majority status, coupled with a union security clause that has been enforced, gives rise to a rebuttable presumption of continued majority status * * *."[3] *Id.* at 351 n.12.

Here the Section 8(f) contract between petitioner and Local 509 contained a union security clause which was enforced, at least initially, and Local 509—unlike the union involved in *Iron Workers*—clearly achieved majority status among petitioner's employees in October 1974, well prior to petitioner's acceptance into the Contractors' Association, when four of petitioner's five employees became members. Once Local 509 became the majority representative of petitioner's

[3] Petitioner errs in asserting (Pet. 12-13) that the Board has never heretofore applied a presumption of majority status in the context of a Section 8(f) agreement. See pages 9-10, *infra*.

employees, its Section 8(f) agreement with petitioner attained the status of a collective bargaining agreement between an employer and a majority representative, and afforded Local 509 a rebuttable presumption of majority status for the duration of the contract. The Board, in a finding affirmed by the court of appeals, concluded that petitioner did not rebut that presumption.[4]

The Board has reached similar results in a number of cases. In *R.J. Smith Construction Co.*, 191 N.L.R.B.

[4] Petitioner's characterization (Pet. 2, 7-9, 12, 14) of Local 509 as a "minority union" is inaccurate. Petitioner attempted to rebut the presumption of continuing majority status by relying on evidence showing that less than a majority of petitioner's employees were *members* of Local 509 in September 1975 and December 1975. However, as the court of appeals correctly held (Pet. App. 13), union membership is not synonymous with union support. The fact that less than a majority of unit employees are union members or pay union dues is not in itself sufficient to rebut the presumption of a union's majority support. *NLRB* v. *Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir. 1976), cert. denied, 434 U.S. 818 (1977); *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 307 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *Sahara-Tahoe Corp.* v. *NLRB*, 581 F.2d 767, 772 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); *Terrell Machine Co.* v. *NLRB*, 427 F.2d 1088, 1090 (4th Cir.), cert. denied, 398 U.S. 929 (1970); *Retired Persons Pharmacy* v. *NLRB*, 519 F.2d 486, 490 (2d Cir. 1975); *Orion Corp.* v. *NLRB*, 515 F.2d 81, 84 (7th Cir. 1975); *NLRB* v. *North American Mfg. Co.*, 563 F.2d 894, 897 n.2 (8th Cir. 1977). As was explained by the Board in *Terrell Machine Co.*, 173 N.L.R.B. 1480, 1481 (1969), enforced, 427 F.2d 1088 (4th Cir. 1970), and quoted and applied in *Orion Corp.* v. *NLRB, supra*, 515 F.2d at 84: " 'There is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof (citations omitted).' "

693, 695 n.5 (1971), the Board recognized that a presumption of majority status could arise from a Section 8(f) contract containing a union security clause that was subsequently enforced. And in *Irvin-McKelvy Co.*, 194 N.L.R.B. 52 (1971), *Williams Enterprises, Inc.*, 212 N.L.R.B. 880, 885 (1974), and *Peter Kiewit Sons' Co.*, 206 N.L.R.B. 562, 569 (1973), the Board concluded that once a union signatory to a Section 8(f) contract achieves majority status, it is entitled to the same presumption of continuing majority status as flows from a collective bargaining agreement, and that the contract is enforceable against the employer.

The cases relied upon by petitioner (Pet. 10-12) are inapposite. In *Alton-Wood River Building & Construction Trades Council*, 144 N.L.R.B. 260 (1963), none of the employees became members of the union until after the employer had joined the multi-employer bargaining association; thus the union did not enjoy a presumption of majority support at the time the employer entered the multi-employer unit and its employees were never effectively merged into that unit. Similarly, in *Davenport Insulation, Inc.*, 184 N.L.R.B. 908 (1970), the Board held that no presumption of majority status resulted from a union's Section 8(f) contract where there was uncontroverted evidence that the union never represented a majority of employees in the relevant unit. Here, however, Local 509 obtained the support of a majority of petitioner's employees, and did so before petitioner joined the Contractors' Association. In

NLRB v. *AAA Electric, Inc.*, 472 F.2d 444 (6th Cir. 1973), the union's majority status was rebutted by the lawful termination of the work-force. Here, the presumption of continuing majority status stands unrebutted (Pet. App. 12-13, 32-33). Therefore, petitioner's employees were lawfully merged into the multi-employer bargaining unit when petitioner joined the Contractors' Association.

Nor is there merit to petitioner's assertion (Pet. 8-10) that *Iron Workers* requires that a union's majority status be established on a project-by-project basis before a pre-hire agreement can attain the status of a collective bargaining agreement. To support its position, petitioner relies (Pet. 8, 10, 11) on this Court's statement in *Iron Workers* that "[t]he employer's duty to bargain and honor the [Section 8(f)] contract is contingent on the union's attaining majority support at the various construction sites" (434 U.S. at 345-346, citing with approval *NLRB* v. *Irvin-McKelvy Co.*, 475 F.2d 1265 (3d Cir. 1973). However, in *Irvin-McKelvy* the pre-hire contract was applicable only on a project-by-project basis (475 F.2d at 1267, 1270), and in *Iron Workers* the union never acquired majority support at any project. Here, the pre-hire contract was not a "project only" agreement. Rather, the relevant bargaining unit was petitioner's entire employee complement, and the record amply demonstrates that the union acquired majority support in that unit.[5]

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[5] As the Board explained in *Precision Stripping, Inc.*, 245 N.L.R.B. No. 34 (Sept. 21, 1979), slip op. 3-4, where an em-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ployer has a "permanent complement of workers, who [move] from site to site" and are covered by the agreement, the unit encompasses all of the sites at which those employees may work. There, the Board noted the distinction recognized in *Dee Cee Floor Covering, Inc.*, 232 N.L.R.B. 421 (1977), between such units and "those in which the employer hires on a project-by-project basis" (slip op. 3 n.6). Similarly, *G. M. Masonry*, 245 N.L.R.B. No. 54 (Sept. 24, 1979), on which petitioner also relies, involved project-by-project hiring.

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